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## MEMORANDUM

**TO:** Interested Persons

**FROM:** Office of Legislative Legal Services

**DATE:** August 3, 2020

**SUBJECT:** Scope of Governor's Power to Issue Executive Orders<sup>1</sup>

## EXECUTIVE SUMMARY

Determining whether an executive order has been issued within the scope of the Governor's authority requires an analysis of the following:

- 1) The type of executive order involved;
- 2) A decision whether the order violates the separation of powers doctrine by interfering with the legislative power vested in the General Assembly;
- 3) An evaluation whether the order falls within any power expressly granted to the Governor by the state constitution or by statute; and
- 4) A determination whether the General Assembly has already legislated in the area which is the subject matter of the executive order.

The following is intended to be a "primer" on the scope of the Governor's authority to issue executive orders. This memorandum is based on a memorandum prepared by this Office, dated April 30, 1980, titled "Legal Analysis of Governor's Executive Order

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<sup>1</sup> This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

on Human Settlement Policies". That memorandum includes an extensive legal discussion of executive orders and the scope of the Governor's power to issue such orders. For a fuller understanding of whether a particular executive order has been legally issued, please refer to that memorandum or contact this Office.

## **1. General Principles**

An executive order is a declaration or directive issued by presidents and governors for the purpose of implementing powers delegated to their offices by constitution or statute and is presumed to be constitutional.<sup>2</sup> There are four considerations in analyzing whether an executive, such as the Governor of this state, has the authority to issue an executive order.

### **1.1. What type of executive order is involved?**

When presented with an executive order for analysis, the analyst must first determine what type of executive order is presented. The distinction between the types of orders is not always clear cut, and some executive orders may have elements of more than one type. The distinction is important, however, because a different standard of authority may be required for the Governor's action to be valid. Executive orders of the supervisory type may be justified merely by the Governor's authority as head of the executive branch of government. Orders which affect the public at large, however, must be "based upon the presence of some constitutional or statutory provision, which authorizes the executive order either specifically or by way of necessary implication."<sup>3</sup> The following are the three general categories of executive orders.

**Ceremonial and political proclamations.** The usual purpose of such orders is to declare some special day or week in recognition or commemoration of some person or event. Such proclamations have no legal effect.

**Orders for administrative direction and control over the daily governmental activities of the executive department.** These types of executive orders might, for example, establish a procedure for designating certain officers to act in the absence of other officials serving under the supervision of the chief executive. These orders are generally in the form of communications with subordinate officials in the nature of

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<sup>2</sup> Executive orders are presumed constitutional and will not be declared invalid except on unescapable grounds. If a challenge is made to the legality of the order, a court would be bound to construe the executive order so as to preserve its constitutional validity, if possible. *Opinion of the Justices*, 118 N.H. 582, 392 A.2d 125 (1978); OLLS 4/30/80 memo, p. 6.

<sup>3</sup> *Shapp v. Butera*, 22 Pa.Cmwlth. 229, 348 A.2d 910, at 913 (1975).

requests or suggested directions in carrying out the duties of the executive department. These types of executive orders are not legally enforceable, and the chief executive could not obtain a court order to enforce such an executive order. The order would carry only the implication of a penalty for noncompliance, such as removal from office, demotion, or loss of favor.<sup>4</sup>

**Gubernatorial ordinances -- orders that go beyond the administration of government and call for action that would affect private citizens.** These types of executive orders seek to implement or supplement the constitution or statutes and generally have the force of law. For example, the Governor may be granted the power to issue executive orders under certain emergency circumstances.

### **1.2. Does the executive order violate the separation of powers doctrine by interfering with legislative power vested in the General Assembly?**

The second step in the analysis is to determine whether there is a violation of the separation of powers. The separation of powers doctrine provides that the legislative function is to create the law, the executive function is to enforce the law, and the judicial function is to interpret the law.<sup>5</sup> The "legislative power" is the power to make laws and to alter them; a legislative body's exclusive authority to make, amend, and repeal laws.<sup>6</sup> An executive order violates the separation of powers doctrine if the order goes beyond merely regulating the internal workings of the executive branch or setting forth the method by which the executive department will implement the existing law or policy as established by the legislature.<sup>7</sup>

When determining whether the separation of powers has been infringed, the analyst must necessarily consider the authority or power to legislate. State legislatures have plenary power for all purposes of civil government, and, therefore, state constitutions are not grants of power to the legislative branch but actually serve as limitations upon that power.<sup>8</sup> And the power to make law necessarily includes the power to determine the public policy to be furthered by the law. The separation of powers doctrine prohibits the executive department from encroaching on the policy-making power of

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<sup>4</sup> *Shapp v. Butera*, 22 Pa.Cmwlth. 229, 348 A.2d 910, at 913 (1975).

<sup>5</sup> *Shapp v. Butera*, 22 Pa.Cmwlth. 229, 348 A.2d 910 (1975); *MacManus v. Love*, 179 Colo. 218, 499 P.2d 609 (1972).

<sup>6</sup> *Black's Law Dictionary* (8<sup>th</sup> ed. 2004).

<sup>7</sup> See: OLLS 4/30/80 memo, pp. 10-13.

<sup>8</sup> *Colorado State Civil Service Employees Association v. Love*, 167 Colo. 436, 448 P.2d 624 (1968).

the legislature. An executive order, therefore, may not encroach on that legislative power vested in the legislative branch alone. Therefore, while it may be acceptable for such an order to set forth the method by which the executive department will implement existing law or policy as established by the legislature or regulate the internal workings of the executive branch, it may not extend beyond the executive branch to the general public and establish new, comprehensive policies for the state.

### **1.3. Does the executive order fall within any power granted to the Governor by the state constitution or by statute?**

The analysis of whether the order violates the separation of powers often implicates this next step in the analysis, determining whether power has been granted to the Governor to issue the order. In some situations, there may not be an impermissible encroachment on the separation of powers if an executive order falls within specific power granted to the Governor by the state constitution or by statute. Section 2 of Article IV of the Colorado constitution provides a general grant of authority. It states that, "[T]he supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed." Whether or not the term "executive power" is a mere summary description of powers which are granted in more specific terms elsewhere in the constitution or a specific grant of power in itself, has been a subject of dispute since the provision first appeared in the federal constitution. For states, the answer has often been determined utilizing a "strong governor"/"weak governor" analysis.

Under the "strong governor" concept, the general delegation of executive power alone suffices to authorize any executive order not otherwise prohibited by law. The essence of the "weak governor" concept, on the other hand, is that a governor has no inherent or prerogative powers and is at all times subject to the state constitution and statutes, in which the governor must find authority for his or her official acts.<sup>9</sup> According to most writers, the "weak-governor" position is the majority view among jurisdictions that have considered the issue. In those jurisdictions, the governor has only such powers and duties as are vested in the governor by constitutional or statutory grant.<sup>10</sup>

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<sup>9</sup> See: OLLS 4/30/80 memo, pp. 13-28.

<sup>10</sup> For a more thorough discussion of the constitutional and statutory grant of authority, see OLLS memo 4/30/80, pp. 13-27.

Some authorities have interpreted relevant case law to include Colorado among those jurisdictions that have adopted the "weak governor" concept of executive power.<sup>11</sup> Under the "weak-governor" concept, the Governor possesses only those powers vested by the constitution and statutes and those powers necessary to perform the duties imposed on the governor. Thus, the general grant of executive power in Article IV, Section 2 of the state constitution implies only administrative powers, such as "close supervision" and "specific staffing and resource allocation decisions".<sup>12</sup> In these jurisdictions the Governor's authority is to execute law and policy, not to create it. Except as properly delegated to the Governor by the General Assembly, the Governor lacks authority to formulate policy or impose requirements beyond regulating the internal workings of the executive branch.<sup>13</sup>

#### **1.4. Has the General Assembly spoken on the subject matter covered in the executive order?**

Finally, the executive order and existing law should be analyzed to determine whether the purpose of the order is to fill a perceived void by providing policies to guide state officials in their decision making or whether existing legislation has foreclosed the Governor's entry into the area. If the General Assembly has indicated a willingness and a purpose to legislate in an area, partial though it may be, executive policy may not encroach.<sup>14</sup> An executive order cannot stand that conflicts with legislatively established policy.

## **2. Judicial Review**

Finally, in any legal action challenging a governor's executive order on constitutional grounds, the party bringing the action bears a heavy burden. Executive orders are presumed constitutional and will not be declared invalid, except on unescapable grounds.<sup>15</sup> Thus, a court would be bound to construe the executive order so as to preserve its constitutional validity, if possible, and in so doing, general rules of statutory construction would apply.

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<sup>11</sup> See: *Colorado Polytechnic College v. State Board*, 173 Colo. 39, 476 P.2d 38 (1970); Asselin, "Executive Orders: Discretion vs. Accountability", 51 *Conn. B.J.* 383, 386, n. 31.

<sup>12</sup> See: *MacManus v. Love*, 179 Colo. 218, 499 P.2d 609 (1972); *Anderson v. Lamm*, 195 Colo. 437, 579 P.2d 620 (1978); OLLS 4/30/80 memo, p. 27.

<sup>13</sup> See: OLLS 4/30/80 memo, pp. 27-28.

<sup>14</sup> See: OLLS 4/30/80 memo, pp. 37-44; *Opinion of the Justices*, 116 N.H. 406, 360 A.2d 116 (1976).

<sup>15</sup> *Opinion of the Justices*, 118 N.H. 582, 392 A.2d 125 (1978).

### **3. Conclusion**

In conclusion, determining whether an executive order has been issued within the scope of the Governor's authority requires an analysis of the type of executive order involved, a decision whether the order violates the separation of powers doctrine by interfering with the legislative power vested in the General Assembly, an evaluation whether the order falls within any power granted to the Governor by the state constitution or by statute, and a determination whether the General Assembly has already legislated in the area which is the subject matter of the executive order.

For further information regarding the scope of the Governor's power to issue executive orders, please contact the Office of Legislative Legal Services at 303-866-2045.

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